U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0262 BLA

SUSAN GRIMES (o/b/o HAROLD D. GRIMES) Claimant-Respondent v. APOGEE COAL COMPANY c/o ARCH COAL, INCORPORATED self-insured through ARCH COAL COMPANY c/o HEALTHSMART CCS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 7/26/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers III, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers III's Decision and Order Awarding Benefits (2019-BLA-06314) rendered on a subsequent claim[1] filed on May 17, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ found Apogee Coal Company (Apogee) is the responsible operator and Arch Coal (Arch) is the responsible carrier. He credited the Miner with thirty-four years of coal mine employment in underground mines and surface mines in conditions substantially similar to underground mines. In addition, he found the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

[1] The Miner filed the present claim but passed away on March 9, 2018, while it was pending. Director's Exhibit 11. Claimant, his widow, is pursuing the claim on behalf of his estate. *Id*.

[2] The Miner filed one previous claim on December 12, 2002. Director's Exhibit 1. The district director denied it by reason of abandonment on February 18, 2003. *Id*. Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner's prior claim was abandoned, Claimant had to establish one element of entitlement to obtain review of the merits of the Miner's current claim. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[4] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Further, it asserts the ALJ erred in finding Arch is the liable carrier. In addition, it asserts the ALJ deprived it of due process by refusing to allow it to obtain discovery from the Department of Labor (DOL) regarding the scientific bases for the preamble to the 2001 regulatory revisions, while relying on the preamble to assess the evidence in this case. On the merits, it contends the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability necessary to invoke the Section 411(c)(4) presumption. It also contends he erred in finding it did not rebut the presumption.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional challenges and its argument regarding its discovery requests, and to affirm the ALJ's determination that Arch is liable for benefits. Employer replied to Claimant's and Director's briefs, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the Miner performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 35-36; Decision and Order at 4.

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 54; Employer's Reply Brief to the Director at 9. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* In addition, it challenges the constitutionality of the removal protections afforded DOL ALJs. *Id.* It generally argues the removal provisions for ALJs in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* Furthermore, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

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[6] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[7] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Sellers III.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator, and it was self-insured by Arch on the last day Apogee employed the Miner; thus we affirm these findings. *See Skrack v Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Employer's Brief at 20; Decision and Order at 21-28. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 16-26.

In 2005, after the Miner ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Employer's Brief at 19-20; Director's Brief at 2; Director's Exhibit 32. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 2; Director's Exhibit 32 at 2. In 2015, Patriot went bankrupt. Director's Brief at 2; Director's Exhibit 52 at 5-6. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch of liability for paying benefits to miners last employed by Apogee when Arch owned and provided self-insurance to that company, as the Director states. Director's Brief at 2.

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 16-39, 50-51; Employer's Reply to Director's Brief at 3-7. It argues the ALJ erred in finding Arch liable for benefits because: (1) no evidence establishes Arch's self-insurance covered Apogee for this claim; (2) without proof of coverage, the DOL improperly pierced Arch's corporate veil in holding it liable; (3) the ALJ treated Arch as a commercial insurer under the regulations rather than a self-insurer; (4) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[8] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; (5) the ALJ erred in denying Arch discovery to establish BLBA Bulletin No. 16-01 was an arbitrary and capricious change in policy; (6) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the APA; (7) the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; and (8) the

[8] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the DOL issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

Director changed its policy in naming Arch as the responsible carrier.[9] Employers' Brief at 16-39.

The Board has previously considered and rejected these arguments under the same material facts in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 10-19 (Oct. 25, 2022) (en banc); *Howard*, 25 BLR at 1-308-19; and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus we affirm the ALJ's determination that Apogee and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

Employer's Discovery Request

While the case was pending before the ALJ, Employer sought discovery from the DOL related to the deliberative process underlying the development of the preamble to the 2001 revised regulations. *See* April 15, 2020 Order; April 2, 2020 Director's Motion for Protective Order. In response, the Director moved for a Protective Order barring the requested discovery. *Id.* Employer opposed the Director's request. *See* April 14, 2020 Employer's Opposition to Motion for a Protective Order. The ALJ granted the Director's motion, finding Employer's discovery request would not lead to relevant information regarding the DOL's deliberative process or the science underlying the revised regulations that was not already set forth in the preamble. April 15, 2020 Order. He also found the information was protected by the deliberative process privilege. *Id.*

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting the opinions of its physicians as being inconsistent with the science the DOL relied on in the preamble. Employer's Brief at 50-53. For the reasons set forth in *Johnson*, BLR , BRB No. 22-0022 BLA, slip op. at 8-9, we reject Employer's arguments.

Invocation of the Section 411(c)(4) Presumption - Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground

[9] We reject Employer's argument that the district director is an inferior officer not properly appointed under the Appointments Clause for the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 19-29 (Oct. 25, 2022) (en banc) (Gresh and Rolfe, JJ., concurring); Employer's Brief at 35-36.

mine if [Claimant] demonstrates that [the Miner] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The ALJ found the Miner worked for at least fifteen years at both underground coal mines and surface coal mines, and that he was regularly exposed to coal mine dust when working at surface coal mines. Decision and Order at 11-12. Thus he found Claimant established at least fifteen years of qualifying coal mine employment. *Id.*

Employer argues the ALJ erred by failing to compare the conditions of the Miner's surface coal mine employment to those known to prevail in underground mines before addressing whether Claimant established regular dust exposure in the Miner's surface coal mine jobs. Employer's Brief at 39-42. It further asserts the ALJ did not adequately apportion the Miner's surface coal mine employment by considering which of his individual job duties occurred in substantially similar conditions to those in underground mines. *Id.* We disagree. Claimant is not required to prove the dust conditions aboveground were identical to those underground. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013). Nor did she have to prove the Miner "was around surface coal dust for a full eight hours on any given day for that day to count." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001). Rather, Claimant need only establish the Miner was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).[10]

The Miner stated on his employment history form that he was exposed to dust, gas, and fumes when working at surface coal mine sites. Director's Exhibit 4. Claimant testified the entire time the Miner worked at strip mine sites, he came home covered in dust, "his glasses were caked with coal dust," his "clothes were caked with coal dust," and he would have to "shake them off outside before [he] could ever wash them." Hearing Tr. at 28-29. The ALJ permissibly found Claimant's uncontradicted testimony and the Miner's employment history form establish the Miner was regularly exposed to coal mine dust during his surface coal mining employment. *See Summers*, 272 F.3d at 480; *Director,*

[10] Employer further challenges the validity of the substantial similarity test at 20 C.F.R. §718.305(b)(1)(i) to the extent it allows miners who worked at surface mines to prove dust conditions were substantially similar to those in underground mines. Employer's Brief at 39-40; Employer's Reply to Director's Brief at 9. We agree with the Director that its argument is at odds with Seventh Circuit precedent. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001); *Director, OWCP v. Midland Coal CO.*, 855 F.2d 509, 512 (7th Cir. 1988) ("a surface miner must only establish that he was exposed to sufficient coal dust in his surface coal mine employment" in order to qualify for the Section 411(c)(4) presumption); Director's Brief at 19-20.

OWCP v. Midland Coal Co. [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1998); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1215 (10th Cir. 2018) (widow's and son's testimony of a miner's "daily appearance after work suggest[ed] [he] was regularly exposed to dust"); *Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 298 (6th Cir. 2018) (widow's testimony that her husband came home from work so covered in dust "you could only see the color of his eyes" and she had to wash his clothes "several times to even get them clean" supports a finding of regular dust exposure); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 487-88 (6th Cir. 2014) (testimony that a surface miner's clothes were covered in dust at the end of his shift supports a finding of regular dust exposure, as it is "typical" of testimony from underground miners who "similarly complain about being exposed to dust while in the mines and having significant dust on their clothes when they return home from work"); *Bonner v. Apex Coal Corp.*, 25 BLR 1-279, 1-282-84, *recon. denied*, (May 24, 2022) (Order) (unpub.) (credible testimony regarding a miner's appearance and the dust on his clothes when he returned home from work may be sufficient to establish the miner was regularly exposed to coal mine dust).

As it is supported by substantial evidence, we affirm the ALJ's determination that the Miner was regularly exposed to coal mine dust during his surface coal mine employment. Decision and Order at 11-12. Because the Miner worked at either underground coal mines or in substantially similar conditions at surface coal mines for at least fifteen years, we also affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Id*.

Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[11] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

[11] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ found Claimant established total disability based on the pulmonary function studies, arterial blood gas studies, medical opinions, and the evidence as a whole.[12] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 7-11. Employer argues the ALJ erred in finding the Miner was totally disabled because both "Drs. Rosenberg and Tuteur attributed [the Miner's] inability to return to work, at least in part, to his metastasized lung cancer" that itself is unrelated to coal mine dust exposure. Employer's Brief at 42-44. We disagree. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11.

As Employer raises no further argument, we affirm the ALJ's finding that Claimant established total disability. *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2); Decision and Order at 11. Consequently, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305(b), (c), 725.309; Decision and Order at 11-12.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[13] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis

[12] The ALJ found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 5.

[13] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.[14]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relied on the opinions of Drs. Rosenberg and Tuteur to disprove legal pneumoconiosis. Dr. Rosenberg opined the Miner had chronic obstructive pulmonary disease (COPD), hyperactive airway disease, emphysema, and lung cancer caused by cigarette smoking and unrelated to coal mine dust exposure. Director's Exhibit 20 at 4-11; Employer's Exhibit 23 at 4-5. Dr. Tuteur also opined the Miner had COPD and lung cancer caused by smoking and unrelated to coal dust exposure. Employer's Exhibits 24 at 5-14, 25 at 2-4. The ALJ found their opinions inadequately reasoned, contrary to the regulations, inconsistent with the preamble to the revised 2001 regulations, and based on statistical generalities. Decision and Order at 15-20.

Employer argues the ALJ erred in discrediting their opinions. Employer's Brief at 44-50. We disagree.

As a basis for excluding legal pneumoconiosis, Dr. Rosenberg cited the Miner's pulmonary function testing which evidenced that his obstructive respiratory impairment partially improved after the administration of bronchodilators. Director's Exhibit 20 at 9. He attributed the irreversible portion of the impairment to airway remodeling. *Id*. The ALJ permissibly found this reasoning unpersuasive because Dr. Rosenberg failed to adequately explain why the irreversible portion of the Miner's obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 18. Dr. Rosenberg also excluded legal pneumoconiosis because the Miner "left his coal mine employment in 1999" and "[d]uring the time frame surrounding this [departure], no documentation exists that he sought medical attention for respiratory complaints." Employer's Exhibit 23 at 5. The ALJ permissibly found this reasoning contrary to the regulation that recognizes pneumoconiosis "as a latent and progressive disease which may

[14] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 15.

first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014); Decision and Order at 18-19. Employer does not specifically challenge either of these credibility findings. Thus we affirm them. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Dr. Rosenberg further attributed the Miner's COPD solely to cigarette smoking based in part on the marked reduction in his FEV1 result in relationship to his FVC result on pulmonary function testing. Director's Exhibit 20 at 3-5. The ALJ permissibly discredited his opinion because it is based on premises inconsistent with studies the DOL cited in the preamble[15] that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Consol. Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Sterling*, 762 F.3d at 491-92; 65 Fed. Reg. at 79,943; Decision and Order at 15-16.

In addition, Dr. Rosenberg opined the Miner's COPD was due to smoking because smoking is more damaging to the lungs than coal mine dust. Director's Exhibit 20 at 5-6. He stated smoking can result in a loss of 19.6 ccs of FEV1 on pulmonary function testing per pack-year while coal mine dust results in a loss of less than 2 ccs per year of exposure. *Id*. The ALJ permissibly found Dr. Rosenberg's opinion not well reasoned as it is based on generalities and because the doctor did not adequately explain why coal mine dust exposure could not have contributed to, or aggravated, the smoking-related COPD. *See Beeler*, 521 F.3d at 726; *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484 (7th Cir. 2007); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. at 79,941 (statistical

[15] Employer generally asserts the ALJ erred in relying on the preamble to the revised 2001 regulations as a basis for discrediting the opinions of Drs. Rosenberg and Tuteur. Employer's Brief at 44-50. We disagree. Federal circuits have consistently held that an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Consol. Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011).

averaging can hide the effect of coal mine dust exposure in individual miners); 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 16-17. Thus we affirm the ALJ's discrediting of Dr. Rosenberg's opinion.[16]

Nor do we agree with Employer's assertion that the ALJ erred in weighing Dr. Tuteur's opinion. Employer's Brief at 48-50. In assessing the etiology of the Miner's COPD, Dr. Tuteur stated he used "statistically based studies for important clinical decision making." Employer's Exhibit 24 at 9. He explained cigarette smokers who have never mined coal develop the COPD phenotype about twenty percent of the time, while miners who never smoke develop COPD only about one percent of the time. *Id*. Thus, comparing the relative risk of COPD among smokers who never mined to the risk for non-smoking miners, and applying this statistical data to the Miner, he concluded his COPD was "due to the chronic inhalation of tobacco smoke, not coal mine dust." *Id*. The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he relied heavily on general statistics, not the Miner's specific case. *See Beeler*, 521 F.3d at 726; *Young*, 947 F.3d at 407; *Knizner*, 8 BLR at 1-7; 65 Fed. Reg. at 79,941; Decision and Order at 19-20.

The ALJ also permissibly found Dr. Tuteur did not adequately explain why coal mine dust exposure could not have aggravated the smoking-related COPD. *See Stalcup*, 477 F.3d at 484; *Young*, 947 F.3d at 407; 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 19-20.

Because the ALJ acted within his discretion in discrediting the opinions of Drs. Rosenberg and Tuteur,[17] we affirm his finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have

[16] Because the ALJ provided valid reasons for discrediting Dr. Rosenberg's opinion, we need not address Employer's additional arguments regarding the weight he assigned to it. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 44-50.

[17] Employer also alleges the ALJ was bound by "training materials" that allegedly instruct ALJs that particular medical opinions must be discredited. Employer's Brief at 45. To the extent Employer argues the ALJ was biased because of a training program, it has not supported its claim with evidence in the record that ALJs were instructed to reject certain evidence, or that the current ALJ attended the training or rendered an improper decision based on such training. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992) ("Charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence."). Therefore, Employer's claim of bias is rejected.

pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 20-21. The ALJ permissibly discredited the opinions of Drs. Rosenberg and Tuteur on the issue of disability causation because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 20-21. We therefore affirm the ALJ's finding that Employer failed to establish that no part of the Miner's total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority decision, including its affirmance of the ALJ's finding that Apogee is the responsible operator and Arch is the responsible carrier. As for Employer's statement that district directors are "final arbiter[s] on the coverage issue" and thus are inferior officers not properly appointed under the Appointments Clause, I agree with the Director that this argument need not be addressed by the Board because it is inadequately

briefed.[18] Director's Brief at 14, *citing Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-315 n.16 (2022) (holding the same argument inadequately briefed); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b); Employer's Brief at 35-36.

GREG J. BUZZARD
Administrative Appeals Judge

[18] Moreover, Employer's statement is based on a faulty legal premise. District directors are not "final arbiter[s]" on the issue of responsible operator. *Id*. While the district director makes an initial determination, a designated responsible operator can submit evidence contesting its designation and seek de novo review of the district director's finding before an ALJ. 20 C.F.R. §725.455(a).